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No. 97-686

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1997

PETE WILSON, et al.,
Petitioners,

v.

JOHN ARMSTRONG, et al.,
Respondents.

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

DERRICK CLARK, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

ARMSTRONG RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Americans with Disabilities Act and the Rehabilitation Act, which prohibit "any" and "all" state departments from discriminating against disabled individuals, apply to state prisons?

2. Should this Court depart from the longstanding rule of *Ex Parte Young*, 209 U.S. 123 (1908), which makes the Eleventh Amendment inapplicable to suits for prospective injunctive relief from continuing violations of federal law against individual state officials?

LIST OF PARTIES

In addition to the parties listed in the Petition for Writ of Certiorari, the United States appeared as an intervenor to defend the constitutionality of the statutes. 28 U.S.C. §2403(a).

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Respondents, a certified class of state prison inmates, respectfully request this Court to deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in *Armstrong v. Wilson,* reported at 124 F.3d 1019 (9th Cir. 1997), and reprinted at Appendix 1a-

19a. Respondents disagree with Petitioners' statement that *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997), reprinted at Appendix 46a-55a, addresses "identical or closely related issues." Petition for Writ of Certiorari ("Pet.") 1. For that reason, Respondents in the *Clark* case are concurrently filing a separate Brief in Opposition to Petition For a Writ of Certiorari.

STATEMENT OF THE CASE

Respondents, a certified class of California state prisoners and parolees with mobility, sight, hearing, learning and kidney disabilities that substantially limit one or more of their major life activities, filed this lawsuit under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12131, *et seq.*, and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. §794, alleging that state prison officials, Petitioners herein, denied them access to programs and facilities available to non-disabled prisoners and parolees.[1] Respondents sought a declaration of their rights and an order requiring the prison officials to comply with the federal statutes. Pursuant to a stipulated process for determining liability and remedy, Petitioners agreed to stipulated facts.

These facts demonstrate that at least one percent of the prison population has a mobility, sight, hearing, or kidney impairment, and that prisoners with disabilities are spread throughout the entire system. ER 73.[2] The prisons are not generally accessible to prisoners with disabilities, and even new prisons built after the ADA's effective date were not constructed in compliance with federal law. ER 77, 79. Some prisoners who use wheelchairs or who have other mobility impairments are housed in inaccessible cells and cannot use the toilet or other

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[1]Jurisdiction of the district court was thus proper under 28 U.S.C. §§1331 & 1343.

[2]Citations are to Appellants' Excerpts of Record, filed by Petitioners in the Ninth Circuit.

sanitary facilities safely. ER 83. Because some prisoners with disabilities are not assigned to appropriate school or work assignments by which they may earn sentence-reducing credits, these prisoners may spend a longer time in prison than similar prisoners without disabilities. ER 78-79, 80-81. Additionally, prison officials have not furnished appropriate auxiliary aids and services to permit effective communication by prisoners with hearing and sight impairments. ER 84-86. Finally, emergency procedures are inadequate to protect inmates with disabilities, who might not be aware of, or be able to respond to, emergency warnings. ER 79-80.

Petitioners accepted these facts as true but argued on summary judgment that, as a matter of law, the ADA and the Rehabilitation Act ("the Acts") do not apply to state prisoners and that the State is immune from suit under the Eleventh Amendment. The district court denied Petitioners' motion, and entered stipulated findings of fact and conclusions of law that Petitioners "violated the rights of some members of the plaintiff class under the Americans with Disabilities Act and §504 [of] the Rehabilitation Act of 1973" and that Petitioners "excluded plaintiffs and some members of the plaintiff class, by reason of their disability, from participation in or denied them the benefits of the services, programs and activities operated by the Department of Corrections within the meaning of" the Acts. ER 111-112. The district court also entered a stipulated remedial order and injunction requiring prison officials to devise a plan to comply with the Acts. Appendix at 78a-80a.

Petitioners appealed the district court's entry of an injunction to the Ninth Circuit Court of Appeals, which affirmed. *Armstrong*, 124 F.3d 1019, Appendix 6a. While taking Petitioners' federalism concerns into account, the Court nevertheless held, "based on the plain meaning of the statutes," that the Acts apply to state prisoners. *Id.*, Appendix 15a-16a. Because the case is one for prospective injunctive relief only, the Court also held that "the

exception to Eleventh Amendment immunity set forth in *Ex Parte Young*, 209 U.S. 123 (1908), squarely applies to allow this action against named individuals in their official capacity." *Id.*, Appendix 17a (footnote omitted). Because *Ex Parte Young* applied, the Court did not consider Petitioners' second question presented, whether the Acts are valid Fourteenth Amendment enactments that support congressional abrogation of the States' Eleventh Amendment immunity, nor did the Court issue an opinion on that issue. The abrogation issue was decided by the Ninth Circuit in a different case, *Clark v. California*, 123 F.3d 1267, Appendix 46a-55a, which is procedurally and factually different than *Armstrong*. *See Armstrong*, 124 F.3d 1019, Appendix 17a, n.2 (referring to *Clark v. California* as "a related case by prisoners against the State of California squarely presenting the Eleventh Amendment defense").

REASONS FOR DENYING THE WRIT

None of the specific questions presented by Petitioners warrant review by this Court. *First*, there is not a "clear and growing conflict among the circuits" regarding the applicability of the Acts to state prisoners. *See* Pet. 5. Instead, the Third, Seventh, Eighth, Ninth, and Eleventh Circuits, as well as district courts in the Second and Sixth Circuits, have all found, based on the plain language of the statutes, that the Acts do apply to state prisoners. Only two judges in the Fourth Circuit have squarely held that the Acts are inapplicable to state prisoners; a vigorous dissent agrees with the other circuits that these two judges misapplied and misinterpreted a standard canon of statutory construction, the "clear statement rule."

Second, the Ninth Circuit in *Armstrong v. Wilson* did not consider or decide Petitioners' second question presented—whether Congress has the power under the Eleventh and Fourteenth Amendments to abrogate state immunity to enforce the Acts' non-discrimination mandates. *Armstrong*, 124 F.3d 1019, Appendix 17a. That

question is therefore inappropriate for review in this case. This Court need not, and should not, determine whether the Acts' abrogation provisions are constitutional, unless it first decides that the more narrow *Ex Parte Young* exception does not apply in this case for prospective injunctive relief against state officials. Respondents in *California v. Clark* have filed a separate Opposition Brief explaining other reasons for this Court to decline to review Petitioners' second question, with which the *Armstrong* Respondents concur.[3]

Third, this Court's opinions in *Idaho v. Couer d'Alene Tribe*, -- U.S. --, 117 S. Ct. 2028 (1997), reaffirmed the continued validity of the *Ex Parte Young* doctrine, and rejected exactly what Petitioners seek here—a case-specific balancing approach to deciding whether state officials have immunity from suits seeking prospective relief only. The Ninth Circuit's approach to last term's decision in *Couer d'Alene* is entirely consistent with those few other courts that have had occasion to consider the decision. The Ninth Circuit's straightforward application of *Ex Parte Young* does not warrant review by this Court because it is consistent with *Couer d'Alene*, long standing precedent of this Court, and all other circuits.

Finally, other matters raised in the Petition are not ripe for review. The ADA and Rehabilitation Act are two statutes in a long line of anti-discrimination laws applicable to business establishments and state and local governments. Petitioners attempt to characterize Congress's application of these general anti-discrimination statutes to all state agencies, including state prisons, as an "intrusion

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[3]As explained more fully in the *Clark* Respondents' Brief In Opposition To Petition For A Writ Of Certiorari, there is no split in the circuits concerning congressional power under the Fourteenth Amendment to prohibit discrimination on the basis of disability, nor Congress's concomitant power to abrogate States' Eleventh Amendment immunity from suit under the Acts. Nor do court decisions upholding the constitutionality of this abrogation conflict with prior decisions of this Court.

into the States' sovereign interest in managing their convicted felons." Pet. 16. Petitioners cannot demonstrate any such intrusion on the record in this case, because Petitioners are not seeking review of a specific order requiring the State to modify its policies or procedures with respect to the management of state prisons, after a court finding that such modifications would not fundamentally alter the nature of the program, nor impose an undue financial or administrative burden on the prison. No such order has been entered by the district court, nor appealed to the Ninth Circuit. Rather, Petitioners seek review only of a decision holding, as a matter of law, that the Acts generally apply to state prisons. *Armstrong*, 124 F.3d 1019, Appendix 7a. Indeed, Petitioners stipulated that the particular remedial order appealed from, which requires only that Petitioners devise plans to comply with the Acts, "extends no further than necessary to correct the violation of the rights at issue and is the least intrusive means necessary to correct the violation of the rights," (Appendix 78a) and agreed not to challenge the content of the injunction in their appeal to the Ninth Circuit. ER 65-66.

I.

THIS COURT'S GUIDANCE IS NOT NECESSARY TO INTERPRET THE PLAIN LANGUAGE OF THE ACTS, WHICH CLEARLY APPLY TO ALL STATE AGENCIES INCLUDING STATE PRISONS.

The plain language of both statutes, and the clear weight of circuit and district court authority, support the Ninth Circuit's decision in this case that the ADA and Rehabilitation Act apply to state prisons. Only two judges of the Fourth Circuit have directly held to the contrary—and then only over a vigorous dissent. *See Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, No. 96-7091, 1997 WL 581652 (4th Cir. Sept. 22, 1997). Moreover, Petitioners' purported fear that enforcement of the Acts will have "serious repercussions on the admin-

istration of the States' prisons" (Pet. 17) raises imaginary difficulties about the application of the Acts in specific circumstances that are not yet ripe for review. There is thus no need for this Court to grant review to interpret the plain meaning of two unambiguous statutes.

A. The Clear Weight Of Circuit And District Court Authority Apply The Acts To State Prisons.

Two years prior to passage of the ADA, the Ninth Circuit held that the Rehabilitation Act applies to state prisoners. *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988). The Eleventh and Eighth Circuits followed suit. *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991); *Lue v. Moore*, 43 F.3d 1203, 1205 (8th Cir. 1994) (dicta); *see also Peeler v. Heckler*, 781 F.2d 649, 652-53 (8th Cir. 1986). Recently, the Third, Seventh, and Ninth Circuits have all determined, based on the plain language of the statutes, that the ADA and Rehabilitation Act apply to state prisoners. *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 172 (3d Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3298 (U.S. Oct. 8, 1997) (No. 97-634); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486-87 (7th Cir. 1997) (Posner, J.); *Duffy v. Riveland*, 98 F.3d 447, 452 (9th Cir. 1996); *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997), Appendix 16a. Moreover, in those circuits in which the issue has not yet been decided, district courts have consistently applied the ADA to state prison inmates. *See Randolph v. Rodgers*, No. 4:94CV991 CDP, 1997 WL 627038, at *9 (E.D. Mo. Oct. 10, 1997); *Herndon v. Johnson*, 970 F. Supp. 703, 708 (E.D. Ark. 1997); *Kaufman v. Carter*, 952 F. Supp. 520, 529 (W.D. Mich. 1996); *Niece v. Fitzner*, 941 F. Supp. 1497, 1505 (E.D. Mich. 1996); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1036-38 (S.D.N.Y. 1995).

While the Tenth Circuit has refused to apply the Acts to prisoner employment (*White v. Colorado*, 82 F.3d 364, 367 (10th Cir. 1996)), that case is distinguishable on its facts. As the Ninth Circuit noted in distinguishing *White*, the *Armstrong* plaintiffs "seek a qualitatively different form

of relief than the prisoners in those cases sought. These plaintiffs seek basic access to facilities, inclusion in safety plans, and nondiscriminatory treatment in residential placements and prison programs. 'Rights against discrimination are among the few rights that prisoners do not park at the prison gates.'" *Armstrong*, 124 F.3d 1019, Appendix 16a (quoting *Crawford*, 115 F.3d at 486 (citing *Turner v. Safley*, 482 U.S. 78, 84 (1987))).

Thus, it is only two judges of the Fourth Circuit who have directly held that the Acts do not apply to state prisoners. *Amos*, 1997 WL 581652, at *22.[4] Their decision is based on a misapplication and misinterpretation of a canon of statutory construction, the "clear statement rule," that has not been similarly misapplied by other circuit courts. Contrary to Petitioners' contention, there is thus no "clear conflict among the circuits" nor is there an "acute" need for this Court's guidance. *See* Pet. 5.

B. This Court Need Not Grant Certiorari To Interpret The Plain Language Of The Acts.

Other courts have had no trouble discerning that the plain language of the Acts applies to state prisons. There is thus no need for this Court to grant certiorari in order to interpret the unambiguous language of the two statutes. The language of the Acts could not be clearer. Section 504 applies to "*any* program or activity receiving Federal Financial assistance," with "program or activity" defined to include "*all* of the operations of—(1)(A) a department, agency, . . . or other *instrumentality of a State* . . . any part of which is extended Federal financial

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[4] *See also Torcasio v. Murray*, 57 F.3d 1340, 1342 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996) (defendant prison officials granted qualified immunity because it was not clearly established that Acts applied to state prisoners, or that obesity was a covered disability). District courts within the Fourth Circuit have also declined to apply the Acts to state prison inmates.

assistance." 29 U.S.C. §794(a), (b) (emphasis added).[5] The ADA applies to "*any State* or local government" and "*any* department, agency, . . . or other *instrumentality of a State* or States or local government . . . ." 42 U.S.C. §12131 (emphasis added). The Court below correctly observed "that Congress could hardly have spoken much more clearly than it did when it made the ADA expressly applicable to all public entities and defined the term 'public entity' to include every possible agency of state or local government." *Armstrong*, 124 F.3d 1019, Appendix 15a, (quoting *Crawford*, 115 F.3d at 485).[6] *See also Amos*, 1997 WL 581652, at *28 (Murnaghan, J. dissenting). Indeed, even the majority in *Amos* found that Congress intended the Acts to apply to states generally. *Id.* at *18. That is, congressional intent to alter the usual balance between the States and Federal Government is plain from the language of the Acts.

Because the Acts are unambiguous, the two Fourth Circuit judges erred in applying the clear statement rule. It is unlikely that this mistake will be repeated by other courts. The clear statement rule is a canon of statutory construction that is only to be applied to ambiguous statutes. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205-206 (1991); *Gregory v. Ashcroft*, 501 U.S.

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[5]The Fourth Circuit ignored this statutory definition of "program or activity," as well as the statutory mandate that Title II of the ADA be interpreted in a manner consistent with Section 504 (42 U.S.C. §§12134(b), 12201(a)) and instead stated that the operations of state prisons do "not fall naturally within the ambit" of the statutory terms "program" and "activity." *Amos*, 1997 WL 581652, at *15.

[6]*See also Yeskey*, 118 F.3d at 170 ("It is hard to imagine how state correctional programs would not fall within this broad definition"); *Randolph*, 1997 WL 627038, at *9 ("broad language of both acts was intended to apply to all parts of state government, including prisons"); *Herndon*, 970 F. Supp. at 706 (plain language of Acts applies to prisons); *Fennell v. Simmons*, 951 F. Supp. 706, 708 (N.D. Ohio 1997) (same); *Kaufman*, 952 F. Supp. at 527-28, 529 (same); *Niece*, 941 F. Supp. at 1506 (same).

452, 461 (1991). "It is not a warrant to disregard clearly expressed congressional intent." *Yeskey*, 118 F.3d at 173.

Moreover, it is highly improbable that other courts will repeat the *Amos* majority's misinterpretation of the rule, which is flatly contradicted by this Court's decision in *Gregory*, 501 U.S. 452. There is no support for the *Amos* majority's finding that "'a clear statement is required not simply in determining whether a statute applies to the States, but also in determining whether the statute applies in the particular manner claimed.'" *Amos*, 1997 WL 581652, at *18 (citation omitted).[7] If the two *Amos* judges are correct, then "Congress cannot make the Rehabilitation Act and the ADA [or any other statute] applicable to state prisons or to other areas traditionally reserved to the states unless it separately lists each state agency that the statutes apply to in the statutory text." *Amos*, 1997 WL 581652, at *30 (Murnaghan, J., dissenting).[8] Such an approach was already rejected by this Court in *Gregory*, which stated "[t]his does not mean that the Act must mention judges explicitly" in order to include

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[7] *See also* Pet. 7 (contending that the clear statement rule "requires a clear expression of congressional intent to *include* important areas of state sovereignty; it is not satisfied by a failure to *exclude* them").

[8] Indeed, that is precisely what Congress did in Title III of the ADA. *See* 42 U.S.C. §12181(7) (listing twelve types of public accommodation covered by the Act). Congress deliberately chose not to list specific state agencies in Title II, but instead made the Act applicable to "any" and "all" state agencies. *See* 42 U.S.C. §12131.

Nor is there any support for *amici* States' contention that, because the management of state prisons is a "core state function," Congress must specify its intention to apply generally applicable statutes to prisons. *See* Brief of Amici Curiae In Support of Petitioners 5-11. Indeed, numerous cases cited for the proposition that management of prisons is a core state function have also recognized that ultimately, federal courts have a duty to intervene to protect prisoners' federal rights. *See Procunier v. Martinez*, 416 U.S. 396, 415-418 (1974) (striking down censorship of inmate mail); *Turner*, 482 U.S. at 84, 99-100 (striking down prohibition on inmate marriage).

them. *Gregory*, 501 U.S. at 467. *See also Yeskey*, 118 F.3d at 173 (quoting passage from *Gregory*).

In *Gregory*, this Court was called upon to determine if a statutory *exception* to the Age Discrimination in Employment Act (ADEA) for certain high ranking officials encompassed state judges. The Court recognized that the ADEA covers all state employees except those specifically exempted, and stated that "'[i]n the context of a statute that plainly excludes most important state public officials, [the exception for] "appointee on the policy-making level"' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges." 501 U.S. at 467. The Court thus held that the breadth of the exception (*not* the breadth of the statute) rendered the statute ambiguous, such that the plain statement rule had to be applied. "In contrast to the ADEA, which expressly excludes most high ranking officials from its reach, . . . the ADA and [Rehabilitation Act] apply to 'any' and 'all' state entities and operations without exclusions." *Armstrong* at Appendix 15a.[9]

C. Petitioners' Other Arguments For Granting Review All Rest Upon Unfounded Assumptions About What The District Court Will Do In The Future, And Are Not Yet Ripe For Review.

It is evident that Petitioners' argument for review, and the majority opinion in *Amos*, are based upon an unproven and untried presumption that application of the Acts to state prisons would have "serious repercussions on the administration of the States' prisons." Pet. 17 (citing *Amos*, 1997 WL 581652, at *13). This also appears to be

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[9]The ADA exempts certain classes of individuals but prison inmates are not excluded. *See, e.g.*, 42 U.S.C. §12210(a) (no protection for current users of illegal drugs); *id.* §12208 (no protection for transvestites). When a statute lists specific exemptions, other exemptions are not to be judicially implied. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

the chief concern of other states that have requested that the petition be granted. *See* Brief of Amici Curiae, filed by State of Nevada on behalf of itself and other states, at 2. That is, Petitioners ask this Court to ignore the plain language of the Acts because application of the Acts would allegedly interfere with prison management. As Judge Posner recognized in determining that the Acts do apply to state prisons, "[r]ealistically, the state is asking us to amend the two statutes. Realistically, judges do this, or something like it at times." *Crawford*, 115 F.3d at 484. Judge Posner acknowledged that judges use the clear statement rule "when they have great confidence that the legislature could not have meant what it seemed to say," (*id.* at 485) and sometimes formulate exceptions to statutes "to save the statute from generating absurd consequences." *Id.* Although Judge Posner stated that "it might seem absurd to apply the Americans with Disabilities Act to prisoners," (*id.* at 486) he also pointed out

> there is another side to the issue. The Americans with Disabilities Act was cast in terms not of subsidizing an interest group but of eliminating a form of discrimination that Congress considered unfair and even odious. The Act assimilates the disabled to groups that by reason of sex, age, race, religion, nationality, or ethnic origin are believed to be victims of discrimination. Rights against discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth. If a prison may not exclude blacks

> from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind person from the dining hall, unless allowing him to use the dining hall would place an undue burden on prison management. (*Id.* at 486 (citations omitted))

Moreover, to the extent the two-judge decision in *Amos*, and Petitioners' arguments for review here, are based on the imagined difficulties in applying the Acts to state prisons, such alleged difficulties are not yet ripe for review.[10] This case is not an appropriate vehicle for the Court to consider the particular manner in which the Acts should be applied to state prisons, because Petitioners here do not seek review of a specific injunction that they allege interferes with proper prison administration, and can present no evidence of such alleged interference for this Court to examine.[11]

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[10]Nor should the Court grant review because of the *amici* States' claims that their litigation workloads have increased slightly because of prisoner suits brought under the Acts. The fact that some claimants may bring unmeritorious claims—under any statute or under the federal constitution—is no reason for eviscerating the law with respect to deserving claimants.

[11]Nor are Respondents aware of any other case in which a circuit court has affirmed an order commanding state prison administrators to take steps to comply with the Acts that are alleged to infringe upon a legitimate penological interest. In *Yeskey*, the district court had dismissed the prisoner's claim under Federal Rule of Civil Procedure 12(b)(6), and the Third Circuit noted that the claim for injunctive relief was mooted by the prisoner's release from prison. 118 F.3d at 169-170 & n.3. In *Amos*, the Fourth Circuit affirmed the district court's dismissal of the case on summary judgment. 1997 WL 581652, at *1. In *Crawford*, the Seventh Circuit reversed the district court's dismissal

(continued...)

As part of a stipulated procedure to determine liability and remedy, Petitioners agreed that they would "make a dispositive motion only on the ground that the ADA and §504 of the Rehabilitation Act do not apply to the programs, services and activities provided by the California Department of Corrections to state prisoners and parolees" or that Petitioners "are immune under the Eleventh Amendment from liability under the ADA and §504," and that any appeal would be on the same grounds. ER 65-66. Petitioners also agreed that if the district court denied their motion, a stipulated Remedial Order and Injunction would be entered against them. ER 65. The Order and Injunction to which Petitioners agreed requires them to submit plans, guidelines, policies and procedures for complying with the Acts, to meet and confer with Respondents' counsel regarding these plans, and to draft stipulated proposed orders with regard to all plans on which the parties agree. Appendix 78a-80a. Petitioners' plans are subject to judicial review only if the parties cannot agree on a remedy with respect to a specific issue, and the district court has power to order modifications to Petitioners' plans only to the extent that the plans do not comply with the Acts. Appendix 81a.[12]

Petitioners have appended one subsequent district court order to their Appendix at 84a-113a, and contend that it demonstrates that enforcement of the Acts will "impose severe disruptions on California's management of its convicted felons . . . ." Pet. 17. That order was entered by the District Court on October 8, 1997, and has

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[11](...continued)
of the complaint, but stated that on remand the court might find that any accommodation of the prisoner's disability would "impose an undue burden on the prison system" and therefore not be required. 115 F.3d at 487.

[12]This is precisely the procedure approved by this Court in order to permit "prison administrators to exercise wide discretion within the bounds" of federal law. *Lewis v. Casey*, –U.S.–, 116 S. Ct. 2174, 2185 (1996).

not yet been appealed.[13] Petitioners do not, and cannot, seek review in this Court of that District Court Order at this time. Nor does that order provide any evidence of Petitioner's contention that enforcement of the Acts will disrupt effective prison management. Indeed, the most Petitioners can say is that the district court "indicated disapproval" of some of the State's plans for complying with the Acts (*id.*): The court did not order Petitioners to take any particular action with respect to prisoner placement or construction, but instead gave Petitioners time to devise a new plan, or to provide more briefing proving that the current plans are valid under the Acts. Appendix 112a-113a.

There is no evidence that the parade of horribles envisioned by the majority in *Amos*, and by Petitioners here, will ever come to pass. *First*, the Acts do not require state officials to take any action that would "fundamentally alter" the nature of the service, program, or activity or that would create an undue financial or administrative burden. 28 C.F.R. §§35.130(b)(7), 35.150(a)(3), 35.164; 28 C.F.R. Pt. 39, Editorial Note; *Southeastern Community College v. Davis*, 442 U.S. 397, 409-413 (1979). *Second*, the circuit courts have already stated that these terms must be applied flexibly, and with due deference to prison security concerns. *See Onishea v. Hopper*, No. 96-6213, 1997 WL 659340, at *11 (11th Cir. Nov. 4, 1997); *Crawford*, 115 F.3d at 487; *Gates v. Rowland*, 39 F.3d 1439, 1447-48 (9th Cir. 1994) (finding discrimination against disabled inmates lawful under the Rehabilitation Act when prison officials demonstrated a reasonable threat to security). Thus, the fear expressed by the *Amos* judges, and by Petitioners here, of undue interference with state prison administration is both premature and unwarranted, and presents no issue warranting review by this Court at this time. There

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[13]Any injunction may be appealed (28 U.S.C. §1292(a)(1)) and reviewed by this Court if warranted.

is no reason for this Court to grant certiorari on the first question presented.

II.

THE NINTH CIRCUIT'S APPLICATION OF *EX PARTE YOUNG* IN THIS CASE TO DENY SOVEREIGN IMMUNITY TO INDIVIDUAL STATE PRISON OFFICIALS SHOULD NOT BE CONSIDERED BY THE COURT BECAUSE THE RULING IS CONSISTENT WITH THE HOLDINGS OF THIS COURT AND ALL THE CIRCUIT COURTS OF APPEALS.

In *Ex Parte Young*, 209 U.S. 123 (1908), the Court created a narrow exception to the State's immunity from suit in federal court under the Eleventh Amendment: a suit is not barred by the Eleventh Amendment when the plaintiff seeks prospective injunctive relief from continuing violations of federal law against individual state officials. The exception is based on the theory that state officials acting contrary to federal law are acting outside the scope of their authority and thus are not then acting as agents of the state. *Id.* at 160; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). This exception does not extend to suits that seek to recover damages for past violations of federal rights because state funds are part of the state itself. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

Relying on *Idaho v. Couer d'Alene Tribe*, --U.S.--, 117 S. Ct. 2028 (1997), a factually different case involving an Indian tribe's claim to land owned by the State of Idaho, Petitioners ask the Court to grant certiorari to consider whether to create an exception to the *Young* doctrine exclusively for state prison officials. Pet. at 13-14. The Court should not grant certiorari on this ground. There is no split of authority among the circuits (nor do Petitioners argue that such a split exists), no published case has suggested the creation of such an exception, and the Ninth Circuit's opinion fits squarely within the

reasoning and holding of the majority of Justices in *Couer d'Alene* and other opinions by this Court.

Petitioners argue that the Court should decide whether the importance of the state's interest in this case—managing its prisoners—is sufficiently strong to override the federal government's interest in ensuring the prospective supremacy of federal law. That question, however, is not appropriate for review because last term a clear majority of this Court rejected a case-specific balancing approach to deciding whether state officials have immunity from a suit seeking prospective relief. *Couer d'Alene*, 117 S. Ct. at 2045 (O'Connor, J., concurring), *id.* at 2048 (Souter, J., dissenting). Instead, that majority reaffirmed the longstanding general rule, applied by the Ninth Circuit below, that the Eleventh Amendment poses no bar to a suit seeking prospective relief to end an ongoing violation of federal rights. *Id.*

The "particular and special circumstances" (*id.* at 2043) that led the Court to grant state officials immunity in *Couer d'Alene* are not present here. In *Couer d'Alene* the Indian tribe brought a suit that was the functional equivalent of an action to quiet title to certain state lands. In addition, the plaintiffs sought to enjoin state officials from exercising any jurisdiction over part of the land. In short, that suit intended to divest the State of some of itself in the form of its land. According to both the principal and concurring opinions, the suit therefore was nothing less than a suit against the State. *Id.* at 2047 (O'Connor, J., concurring). In Justice Kennedy's words, "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 2043.

That is not the case here. Because plaintiffs are seeking only injunctive relief to enjoin ongoing violations of federal anti-discrimination statutes, this action fits squarely within the exception created by *Young*. *Armstrong v. Wilson*, 124 F.3d 1019, Appendix 17a. In *Couer d'Alene*

itself this Court emphasized that "'*Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. [The *Young* doctrine is] necessary to permit federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States.'" *Couer d'Alene*, 117 S. Ct. at 2046 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985) and *Pennhurst*, 465 U.S. at 105) (O'Connor, J., concurring).

The Ninth Circuit's application of the *Young* doctrine to prison officials in this case is consistent with other decisions by this Court and the courts of appeals. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *Thompson v. Enomoto*, 915 F.2d 1383, 1390 (9th Cir. 1990), *cert. denied*, 502 U.S. 1071 (1992); *Duran v. Carruthers*, 885 F.2d 1485, 1489 (10th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990); *Wolfel v. Morris*, 972 F.2d 712, 718 (6th Cir. 1992). And it is consistent with the other courts that have applied last term's decision in *Couer d'Alene*. *See Bethesda Lutheran Homes & Servs., Inc. v. Leean*, 122 F.3d 443, 444 (7th Cir. 1997) (Posner, J.) (no immunity for injunctive relief against state officials for violating federal rights); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 914 (8th Cir. 1997) (noting that seven justices reject the balancing approach adopted by the principal opinion in *Couer d'Alene* and reaffirm the basic rule of *Young*); *LCS Servs., Inc. v. Caperton*, No. 3:96-CV-31, 1997 U.S. Dist. LEXIS 13697, at **7-13 (D. W.Va. Aug. 15, 1997).

Petitioners have not demonstrated that the Ninth Circuit's opinion conflicts with the decisions of this Court or the circuit courts of appeals. Nor have they explained why this case is so unique that the Court should consider a departure from the long-established rule of *Ex Parte Young*. The Court should not grant the writ of certiorari on the third question presented by the Petition.

CONCLUSION

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully,

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